Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

(4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 97-557

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CHRISTOPHER PANGALOS,
*Petitioner,*

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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# RESPONDENT'S MOTION FOR DAMAGES AND COSTS PURSUANT TO RULE 42.2

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Respondent Prudential Insurance Company of America ("Prudential" or the "Company"), by its attorneys, hereby seeks damages and costs against counsel for Petitioner pursuant to Supreme Court Rule 42.2 for the filing of a frivolous petition for writ of certiorari. As discussed in more detail below, counsel for Petitioner omitted several material facts that formed the basis for the decisions of the courts below. As a result, counsel for Petitioner is improperly seeking this Court's review on an issue not raised by this case and has unnecessarily forced Respondent to incur legal fees and costs.

Supreme Court Rule 42.2 sets forth the standards by which a respondent may seek damages and costs for the filing of a frivolous petition for writ of certiorari:

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> When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Sup. Ct. R. 42.2; *see also* 28 U.S.C. § 1927 (empowering any court of the United States to require an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.")

In the instant case, Petitioner's counsel omitted several facts in the petition that were material to the lower courts' conclusion that Mr. Pangalos could not sustain a claim under the Americans with Disabilities Act ("ADA"). As discussed in more detail in Respondent's brief in opposition to the petition, the most critical of these omissions is the fact that Prudential offered Mr. Pangalos a reasonable accommodation that he requested and that he acknowledged would permit him to perform his job as an insurance salesperson in the Philadelphia area. Mr. Pangalos ultimately rejected this offer, and instead pursued what he considered to be a better accommodation, namely the establishment of his own sales office in Kentucky, where he had moved his family months earlier without informing Prudential. This rejection of an accommodation removes Mr. Pangalos from the ADA's protections and warranted judgment for Prudential. 29 C.F.R. § 1630.9(d); *Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342, 344-45 (CA7 1996). Indeed, one of the district court's alternative grounds for granting summary judgment was the fact that "the accommodation offered by defendant is, as a matter of law, reasonable." D. Mem. & Order, attached as App. to Pet. at 8a.

By deliberately omitting this crucial fact that formed the basis of the decisions below, Counsel for Mr. Pangalos is improperly seeking this Court's review on an issue that simply is not raised by this case, namely whether Prudential had the burden of showing that it was unable to transfer Mr. Pangalos to another position. It is immaterial whether alternative accommodations, such as transfer, were available when it is uncontroverted that Mr. Pangalos rejected a reasonable accommodation that he had requested. By omitting this fact, counsel for Petitioner has wasted scarce judicial resources and forced Prudential to incur fees and costs in responding to this truly frivolous petition.

Mr. Pangalos' rejection of a reasonable accommodation is not the only important fact omitted from the petition. The petition attempts to show bad faith on the part of Prudential by suggesting that the Company ignored his requests for accommodation prior to 1995. What Petitioner fails to mention, however, is that he was out of work on short-term disability leave from late fall 1993 and throughout all of 1994. When he commenced the leave, Mr. Pangalos told his supervisor that he was "out sick" and the "doctors have told you I'm not coming back." Indeed, only employees who are certified as unable to work are eligible for short-term disability benefits. Therefore, it is not surprising that Prudential would not have discussed accommodations with Mr. Pangalos so long as he was unable to work. The record reflects that Prudential discussed accommodations issues with Mr. Pangalos, and even contacted vocational agencies specializing in ADA issues, just before his return to work. Thus, contrary to the

impression left by Petitioner's failure to discuss his disability leave, Prudential acted in good faith in attempting to accommodate Mr. Pangalos.[1/]

Finally, the instant petition also does not reveal the fact that Mr. Pangalos had purchased a home in Kentucky in April of 1994 and moved his family there shortly thereafter without notifying Prudential and without requesting a transfer before doing so. This critical fact makes not so surprising Mr. Pangalos' rejection of the mobile toilet facility for his job in Philadelphia and his insistence that he be provided instead with his dream accommodation, namely his very own Prudential sales office in Kentucky. It is dismaying that counsel for Petitioner would omit this fact when she was specifically chastised at oral argument by the Third Circuit Court of Appeals for excluding it from her brief submitted to that court.

The omission of these key facts renders the instant petition frivolous. Petitioner is impermissibly seeking this Court's review by attempting to transform this case by omission into something that it is not. While Respondent does not deny the right of Petitioner's counsel to present the facts in a light favorable for her client, these clear omissions of material facts completely misrepresent this case to this Court. Accordingly, this is one of those rare cases where damages and costs should be assessed against counsel for Petitioner pursuant to Supreme Court Rule 42.2.

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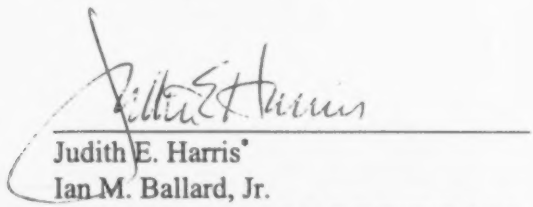
1/ Prudential's good faith is further evidenced by the fact that it actively searched for alternative positions for him in its numerous field offices. Further, although Mr. Pangalos had relocated himself to Kentucky without notice, Prudential agreed to waive its transfer rules and allow him to seek employment with the Company in the Kentucky area. The Company also arranged for Mr. Pangalos to interview for a position in Lexington, Kentucky. All of these facts are noticeably absent from the petition as well.

Accordingly, Respondent respectfully requests that this Court assess damages and costs against counsel for Petitioner in the amount of $7454.49, as detailed in the affidavit of counsel attached as Exhibit A.

Respectfully submitted,



Judith E. Harris*
Ian M. Ballard, Jr.
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
Telephone: (215) 963-5028/5080

Counsel for Respondent

* Counsel of Record

Dated: October 28, 1997

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-557

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CHRISTOPHER PANGALOS,
*Petitioner*,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
*Respondent.*

---

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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# AFFIDAVIT OF JUDITH E. HARRIS

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I, Judith E. Harris, hereby depose and say as follows:

1. I am a partner in the law firm of Morgan, Lewis & Bockius LLP, counsel for Respondent Prudential Insurance Company of America in the above-captioned matter.

2. On October 9, 1997, I wrote to counsel for Petitioner and requested that she withdraw the instant petition because its omission of material facts rendered it frivolous. A true and correct copy of my letter is attached as Exhibit 1. Counsel for Petitioner responded that she would not withdraw the petition. A true and correct copy of her letter is attached as Exhibit 2.

3. Because counsel for Petitioner has decided to pursue this frivolous petition, Prudential has incurred attorneys' fees and costs.

4. Exhibit 3 to this Affidavit itemizes the time spent on responding to the petition by me, an associate in my office, and two paralegals.

5. I am a 1970 graduate of Howard University Law School and have been a partner at Morgan, Lewis & Bockius LLP since 1994. My billing rate for this matter is $280.00 per hour. Mr. Ballard is a 1995 graduate of the University of Virginia School of Law and has been associated with Morgan, Lewis & Bockius LLP since 1996. Mr. Ballard's normal billing rate is $125 per hour. Lisa Hoffman and Amy DeSimone, two paralegals who worked on this matter, have billing rates of $105 and $95, respectively.

6. Mr. Ballard performed the majority of the work on this matter and his hours total 36.10. I supervised Mr. Ballard's work and spent 2.4 hours on this matter. Ms. Hoffman spent 1.9 hours on this matter and Ms. DeSimone spent 9.0 hours on this matter.

7. As itemized in Exhibit 3, the total legal fees incurred in responding to the petition to date are $ 6239.00.

8. Respondents have also incurred costs in responding to the petition, including telephone, facsimile, Westlaw research, duplicating and printing charges in the amount of $1215.49, as itemized in Exhibit 3.

9. Accordingly, Respondent respectfully requests reimbursement for attorneys' fees and costs in the amount of $ 7454.49.

I declare under penalty of perjury that the foregoing is true and correct.

Judith E. Harris

Executed: October 28, 1997

ALL STATE LEGAL 800-222-0510 E011 RECYCLED

2000 One Logan Square
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Morgan, Lewis
& Bockius LLP
COUNSELORS AT LAW

Judith E. Harris
215-963-5028

October 9, 1997

**VIA TELECOPY**

Donna E. Baker, Esquire
Larry Pitt & Associates
1918 Pine Street
Philadelphia, PA 19103

**Re: Pangalos v. Prudential Insurance Co. of America**

Dear Ms. Baker:

I am in receipt of the petition for writ of certiorari that you have filed with the United States Supreme Court in connection with the above-referenced matter. After careful review of your brief, I am writing to inform you that we consider the petition to be frivolous and, quite frankly, misleading. If you fail to withdraw the petition, we will seek damages and double costs for the filing of a frivolous petition under Supreme Court Rule 42.

The factual omissions in your petition are numerous. Most significantly, you fail to mention that Mr. Pangalos was in fact offered a reasonable accommodation -- mobile toilet facilities -- and that he rejected this offer. The legal issue of whether transfer to another position is required, and the related issue of which party bears the burden of identifying suitable positions, is immaterial if another reasonable accommodation has already been offered. Your omission of this key fact is very misleading.

You also do not disclose the fact that Mr. Pangalos was on disability leave beginning in December 1993 and throughout all of 1994. Nonetheless, you argue that Prudential was largely unresponsive to Mr. Pangalos during that period. Clearly, the fact that he was on disability leave is significant in determining whether the company's response was appropriate.

Finally, you fail to mention that Mr. Pangalos had purchased a home in Kentucky in April 1994 and moved his family there shortly thereafter. Frankly, I am amazed that you failed to present

this fact to the Supreme Court after one of the Third Circuit judges at oral argument clearly expressed his displeasure that he had to read Prudential's brief to learn this.

This letter is written only after careful thought and consideration. In my twenty-seven years of practice, I rarely have called an adversary's filings frivolous or misleading. In this case, however, I believe that the omissions are serious enough to seek sanctions under Rule 42. I hope you will carefully consider this matter and withdraw your petition. If I do not hear from you by October 13, 1997, I am afraid we will be forced to proceed as outlined above.

Sincerely,

Judith E. Harris

LARRY PITT & ASSOCIATES, P.C.
ATTORNEYS AT LAW

LARRY PITT * †
GEORGE D. WALKER, JR. * †
KATHY KENNEDY
ANDREA J. COLTON
DONNA E. BAKER ◊
MARK S. SCHEFFER
NEIL S. KERZNER *
ANDREA L. McCORMICK *
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October 10, 1997

Judith Harris, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103-6993

RE: **Christopher Pangalos v. Prudential Ins. Company of America**

Dear Ms. Harris:

In response to your letter of October 9, 1997, please be advised that I am in disagreement with your assessment of the merit of the Petition for Writ of Certiorari. The Petition for Writ of Certiorari is not frivolous. The Petition, including the attached Appendix, contains all relevant facts necessary for the Supreme Court to render a decision on the Question Presented for Review.

The Petition for Writ of Certiorari will not be withdrawn. Should you elect to file a submission seeking recovery of damages and costs under Rules 42 and 43, such submission would be similarly subject to an application by Petitioner for relief under Rule 42.

Very truly yours,

Donna E. Baker

Donna E. Baker, Esquire

DB/cd

ALL-STATE® LEGAL 800-222-0510 EDIT RECYCLED

3

October 28, 1997 
Re: Pangalos v. Prudential Insurance Company, No. 96-CV-0167, E.D. PA.

Detail for Fee Services Rendered

| Date | Name | Description | Hours | Amount |
|---|---|---|---|---|
| 09/30/97 | Harris, J.E. | Review of Petition for Writ of Certiorari to U. S. Supreme Court; telephone message to Donna McCarthy; conference with M. Ballard. | .90 | 252.00 |
| 09/30/97 | Ballard, I.M. | Conference in office with J. E. Harris re Supreme Court brief; telephone call to Supreme Court's clerk's office | .40 | 50.00 |
| 10/05/97 | Ballard, I.M. | Review plaintiff's Supreme Court brief | .70 | 87.50 |
| 10/07/97 | Ballard, I.M. | Research issues for Supreme Court brief | 1.90 | 237.50 |
| 10/08/97 | Ballard, I.M. | Research issues for Supreme Court brief; draft letter to Donna Baker | 3.50 | 437.50 |
| 10/09/97 | Harris, J.E. | Review of letter to plaintiff's counsel regarding sanctions; discussion of same with Donna McCarthy; letter to Donna Baker. | .20 | 56.00 |
| 10/09/97 | Ballard, I.M. | Review file; conference in office with J. E. Harris re letter to Donna Baker | .30 | 37.50 |
| 10/10/97 | Ballard, I.M. | Research issues for Supreme Court brief | 1.10 | 137.50 |
| 10/12/97 | Ballard, I.M. | Research issues for Supreme Court brief | 1.50 | 187.50 |
| 10/13/97 | Hoffman, L.W. | Telephone conversation with Third Circuit regarding transcription of Oral Argument; telephone conversations with I. Ballard regarding same (2). | .30 | 31.50 |

| | | | | |
|---|---|---|---|---|
| 10/13/97 | Ballard, I.M. | Draft Supreme Court brief; review Supreme Court rules; research Supreme Court Rule 42.2 sanctions cases; conference in office with J. E. Harris re brief and plaintiff's response to J. E. Harris' letter | 6.90 | 862.50 |
| 10/14/97 | Hoffman, L.W. | Telephone conversations with Ruffin (Third Circuit Court Clerk) regarding transcript of Oral Argument (2); conferences with J. Harris, I. Ballard regarding same. | .30 | 31.50 |
| 10/14/97 | Ballard, I.M. | Draft Supreme Court brief | 5.60 | 700.00 |
| 10/15/97 | Hoffman, L.W. | Prepare correspondence to Ruffin (Third Circuit Clerk) regarding request for Oral Argument tape. | .40 | 42.00 |
| 10/15/97 | Harris, J.E. | Review of Brief in Opposition To Certiorari. | .90 | 252.00 |
| 10/16/97 | Hoffman, L.W. | Conference with I. Ballard regarding typesetting schedule; legal research regarding Brief in Opposition to Petition for Certiorari; conference with A. DeSimone regarding finalizing brief to go to printer; prepare correspondence to Ruffin regarding oral argument tape. | .90 | 94.50 |
| 10/16/97 | Ballard, I.M. | Revise Supreme Court brief; conference in office with L. Hoffman re edits and printing requirements | .70 | 87.50 |
| 10/16/97 | DeSimone, A.C. | Proofread Respondent's Brief in Opposition; review Supreme Court Rules regarding same; conference with M. Ballard regarding same. | 1.90 | 180.50 |
| 10/17/97 | Ballard, I.M. | Draft Supreme Court motion for damages and costs. | 1.60 | 200.00 |
| 10/17/97 | DeSimone, A.C. | Conference with M. Ballard regarding edits to Respondent's brief. | .20 | 19.00 |
| 10/19/97 | Ballard, I.M. | Draft Motion for damages and costs. | 1.60 | 200.00 |
| 10/20/97 | Harris, J.E. | Telephone conference with Donna McCarthy regarding brief in opposition and motion regarding sanctions; review of Petition for Damages and Costs; revisions to same. | .40 | 112.00 |
| 10/20/97 | Ballard, I.M. | Draft motion for damages and costs; prepare attorneys' fees affidavit; | 3.40 | 425.00 |

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|---|---|---|---|---|
| | | revise brief in opposition to petition for certiorari; prepare certificate of service; revise motion for damages | | |
| 10/20/97 | DeSimone, A.C. | Research Respondent's brief regarding revisions; telephone discussion with Packard Press regarding type setting brief; prepare table of contents and table of authorities regarding same. | 3.10 | 294.50 |
| 10/21/97 | Ballard, I.M. | Revise motion for damages and costs; prepare exhibits for same; telephone call to Donna B. McCarthy re Rule 29.1 statement | 1.00 | 125.00 |
| 10/21/97 | DeSimone, A.C. | Proofread Respondent's Motion for Damages and Costs pursuant to Rule 42.2 and Affidavit of J. Harris. | 1.20 | 114.00 |
| 10/22/97 | Ballard, I.M. | Revise motion for damages; revise brief in opposition to certiorari | .60 | 75.00 |
| 10/22/97 | DeSimone, A.C. | Conference with M. Ballard regarding status of Respondent's brief in opposition. | .20 | 19.00 |
| 10/23/97 | Ballard, I.M. | Conference in office with Amy DeSimone re submission of brief to printer; review Supreme Court rules re service; conference in office with J. E. Harris re Rule 29.1 disclosure | .50 | 62.50 |
| 10/23/97 | DeSimone, A.C. | Telephone conversation with Packard Press regarding typesetting Respondent's Brief in Opposition; prepare package regarding same. | .60 | 57.00 |
| 10/24/97 | Ballard, I.M. | Review draft of opposition brief from printer; arrange for transcription of 3d circuit oral argument | 1.90 | 237.50 |
| 10/24/97 | DeSimone, A.C. | Review typeset version of Respondent's brief in opposition; Conference in office with M. Ballard regarding same; telephone conversation with L. Barth at Packard Press regarding additional revisions. | 1.80 | 171.00 |
| 10/26/97 | Ballard, I.M. | Review and revise 3d circuit oral argument transcript from audio tape | 2.90 | 362.50 |
| | | Matter Total | 49.40 | $6,239.00 |

October 28, 1997
Re: Pangalos v. Prudential Insurance Company, No. 96-CV-0167, E.D. PA.

Summary of Disbursements and Other Related Charges Incurred on Your Behalf

| Description | Amount |
|---|---|
| Telephone/Fax | 9.32 |
| Duplicating | 41.64 |
| Computer Legal Research | 306.53 |
| Printing Costs | 858.00 |
| Total | $1215.49 |